Supreme Court, U.S.
FILED
JAN 20 1999
CLERK

(12)

No. 98-208

In the Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,
PETITIONER,

v.

AMERICAN DENTAL ASSOCIATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Retail Federation (the "NRF") is the world's largest retail trade association, with membership that includes the leading department, specialty, discount, mass merchandise and independent stores, as well as 32 national and 50 state associations.[1] NRF members represent an industry that encom-

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[1] Pursuant to Rule 37.6, the NRF discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its legal counsel make a monetary contribution to the preparation or submission of this brief. Letters of consent by the parties to the filing of this brief are being filed simultaneously herewith.

passes more than 1.4 million U.S. retail establishments, and employs more than 20 million people — about 1 in 5 American workers. NRF's international members operate stores in more than 50 nations.

The NRF and its members have a high level of interest in litigation, such as this matter, raising important legal questions under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq*. The NRF has submitted numerous *amicus* briefs over the past several years in labor and employment cases which have been of interest to its members.[2] The present case raises an important question of statutory interpretation, regarding the standard established in 42 U.S.C. §1981a(b)(1)[3] for

[2] The complete list of labor and employment cases in which briefs *amicus curiae* have been submitted (and accepted) is as follows:

a. *Weis Markets, Inc. t/a Mr. Z's Food Mart and United Food and Commercial Workers Local 72*, Case No. 98-1892 (U.S. Court of Appeals for the Fourth Circuit) (currently pending);

b. *Lewis* v. *KMart Corp.*, Case No. 98-2179 (U.S. Court of Appeals for the Fourth Circuit) (currenly pending);

c. *Lowery* v. *Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998) *petition for cert. filed*, December 14, 1998;

d. *Weis Markets, Inc.*, 325 NLRB No. 162 (1998);

e. *Drexel Co.*, 316 NLRB 1103 (1995);

f. *L'Enfant Plaza Properties*, 316 NLRB 1111 (1995);

g. *Oakland Mall*, 316 NLRB 1160 (1995) *review denied sub nom., United Food and Commercial Workers, Local No. 880* v. *NLRB*, 74 F.3d 292 (D.C.), *cert. denied sub nom., International Brotherhood of Teamsters Local No. 243* v. *NLRB*, 519 U.S. 809 (1996); and

h. *Makro, Inc.*, 316 NLRB 109 (1995) *review denied sub. nom., United Food and Commercial Workers, Local No. 880* v. *NLRB*, 74 F.3d 292 (D.C. Cir.), *cert. denied sub nom., International Brotherhood of Teamsters Local No. 243* v. *NLRB*, 519 U.S. 809 (1996).

[3] This section provides in full:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

allowing juries to consider whether to award punitive damages under Title VII and the ADA. The Court's interpretation of this provision is likely to have a significant effect on the NRF's membership for years to come.

II. SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to clarify the circumstances under which a District Court may allow a jury to consider an award of punitive damages against an employer or other respondent, pursuant to 42 U.S.C. §1981a(b)(1). Appellate courts, including the court below in *Kolstad* v. *American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), have consistently rejected the interpretation urged by the petitioner, namely "that punitive damages should be available in every case strong enough to get to the jury on simple compensation . . ." *Id.* at 961. Adoption of such a standard would ensure that in every case in which intentional discrimination is found, juries would be deciding whether punitive damages are appropriate. Such a result is contrary to the language and purpose of §1981a(b)(1).

The interpretation pressed on this Court by the petitioner, if adopted in the same or similar form in this Court's opinion, would have numerous consequences adverse to the administration of justice and the effective operation of the businesses owned and operated by the NRF's members. A ruling in favor of the petitioner would provide litigants and their attorneys with strong incentives to bring suit under Title VII and the ADA, regardless of the merits of the underlying claims, due to the potential availability of punitive damages in every case where unlawful discrimination is found. In addition, a ruling which treats punitive damages no differently than other forms of damages will act as a spur to plaintiffs and their attorneys to choose federal over state court, even when punitive damages are available under applicable state law. Retail employers, while continuing to strive to ensure compliance with equal employment opportunity laws, will be unneces-

sarily burdened with increased damages and related costs of litigation, even though the evidence of wrongdoing presented to a jury may be no more than what is presented to establish liability in the most ordinary of cases.

III. ARGUMENT

A. THE DECISIONS OF THE COURTS OF APPEALS, INCLUDING THE COURT BELOW, HAVE PROPERLY REJECTED THE STANDARD URGED BY THE PETITIONER AND *AMICI*.

Under 42 U.S.C. §1981a(a)(1), a complaining party who has established that the "respondent. . .engaged in unlawful intentional discrimination," "may recover compensatory and punitive damages as allowed in subsection (b) of" 1981a.[4] Section 1981a(b)(1) sets forth the rules for recovery of punitive damages. In pertinent part, this section provides for recovery of such damages "if the complaining party demonstrates that the respondent engaged in a discriminatory practice. . .with malice or reckless indifference to the federally protected rights of" the complainant. Thus, the plain terms of §1981a require two separate inquiries, first, on the existence of intentional discrimination, followed by an inquiry under §1981a(b)(1) to determine if sufficient evidence has been presented for the question of punitive damages to be considered by a jury.

The petitioner would impermissibly conflate these inquiries, contrary to the plain intent of Congress. In her brief to this Court (p. 14), the petitioner has argued that the phrase "reckless indifference to the federally protected rights of an aggrieved individual," contained in 42 U.S.C. §1981a(b)(1), means that "punitive damages are. . .authorized where a

[4] 42 U.S.C. §1981a(a)(2) contains a parallel provision for the recovery of compensatory and punitive damages under the ADA and 29 U.S.C. §794a(a)(1).

[5] "The term 'discriminatory practice' means the" intentional discrimination made unlawful by Title VII. See 42 U.S.C. §1981a(d)(2).

defendant knew or should reasonably have realized that its conduct was probably unlawful." In discussing this standard, petitioner strains to define any circumstances under which intentional discrimination would not suffice to justify sending the question of punitive damages to the jury. (*See* Brief of Petitioner, pp. 32-34). While asserting that the standards in Title VII are sufficiently unclear that "any intentional act of discrimination would [not] necessarily involve reckless indifference" (*see id.*), the three limited situations specifically identified by petitioner as those "in which intentional action may or may not be 'discrimination,'" (*see* Brief of Petitioner, pp. 33-34), offer no comfort to the NRF's membership. It is apparent that petitioner's ultimate aim is to establish a rule that in every case in which liability is established, juries must pass on the propriety and amount of punitive damages.[6]

Several appellate courts in recent years, including the court below in *Kolstad* v. *American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), have addressed the same arguments advanced by the petitioner, and found them wanting. Courts have consistently rejected the argument that a finding of intentional discrimination under Title VII is sufficient for the jury to consider the propriety of punitive damages. Rather, as articulated most recently in *Ngo* v. *Reno Hilton Resort Corp.*, 140 F.3d 1299 (9th Cir.), *amended, reh'g en banc denied*, 156 F.3d 988 (9th Cir. 1998), six circuits "require plaintiffs seeking punitive damages under Title VII to make a showing beyond the level of intentional discrimination required for compensatory damages." *See* 156 F.3d 988 (*amending* 140 F.3d at 1304). The reasoning of these opinions, outlined below, should inform the Court's consideration of the question presented.

[6] One of the *amici curiae* submitting briefs on behalf of the petitioner unequivocally requests the adoption of such a rule. *See* Brief of the National Employment Lawyers Association, at 4 (endorsing rule "that no evidence beyond that which was submitted on liability need be offered to establish entitlement to punitive damages. . .").

In rejecting an interpretation such as that urged by the petitioner, the court in *Emmel* v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 636 (7th Cir. 1996), began its analysis by recognizing that, under Title VII, a prevailing plaintiff need only prove "that intentional unlawful discrimination was more likely than not the reason underlying the adverse employment decision in question." The standard established by Congress in §1981a(b)(1) for submission to the jury of the question of punitive damages, is obviously not the same as that for deciding whether intentional discrimination occurred. Indeed, this standard "is a higher hurdle than merely proving the underlying unlawful discrimination." *Emmel* v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d at 636.

Similarly in *Harris* v. *L&L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997), the court called it "well established that exemplary damages are not an element of recovery in every case involving an intentional tort." (citing *McKinnon* v. *Kwong Wah Restaurant*, 83 F.3d 498, 508-509 (1st Cir. 1996)). The *Harris* court reasoned that "the text and background of the Civil Rights Act of 1991, which authorizes punitive damages, emphasize that this extraordinary remedy is not to be awarded automatically in every successful Title VII suit." *Harris* v. *L&L Wings, Inc.*, 132 F.3d at 982. *Accord*, *Ngo* v. *Reno Hilton Resort Corp.*, 140 F.3d at 1304 ("we interpret the language of section 1981a to require plaintiffs seeking punitive damages to make a showing beyond the threshold level of intent required for compensatory liability.").

By making punitive damages potentially available in every case, the rule urged by the petitioner is contrary to the limited scope which such damages are intended to have under §1981a(b)(1). Section 1981a(b)(1)' "was enacted against a backdrop of prevailing doctrine that punitive damages are to be awarded only in cases where the twin aims of punishment and deterrence are paramount." *Harris* v. *L&L Wings, Inc.*, 132 F.3d at 983. The court added that "even when they are available, punitive damages remain wholly within the jury's discretion and 'are never awarded as of right, no matter how

egregious the defendant's conduct.'" *Id.* (quoting *Smith* v. *Wade*, 461 U.S. 30, 52 (1983)). "There is no vested right to punitive damages on the part of the plaintiff and where allowed, they are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future." *McKinnon* v. *Kwong Wah Restaurant*, 83 F.3d at 498. Simply put, such damages are "not favored in the law and are allowed only with caution and within normal limits." *Id.*

The adoption of a rule allowing the jury to consider the propriety and amount of punitive damages, virtually every time that a finding of intentional discrimination is made, will elevate punitive damages to a status not intended by Congress in enacting the Civil Rights Act of 1991. The amount of punitive damages which can be assessed is already capped, pursuant to 42 U.S.C. §1981a(b)(3). In enacting 1981a(b)(1), Congress further established a specific standard defining the circumstances under which punitive damages "may" be recovered. *See* 42 U.S.C. 1981a(b)(1). This standard requires a preliminary finding of intentional discrimination. *See* 42 U.S.C. 1981a(a)(1). Eliminating the clear distinctions between the requirements for finding intentional discrimination and considering the propriety of punitive damages not only rewrites the 1991 amendments to Title VII, but also makes punitive damages as routine an element of recovery as back pay. This result cannot have been intended by the Congress that crafted §1981a(a) and (b).

B. SIGNIFICANT CONCERNS EXIST REGARDING THE RESULT URGED BY PETITIONER AND *AMICI*.

According to the petitioner and her *amici*, the result they seek to achieve will have no adverse effects on the federal courts or American business. In its brief *amicus curiae* (p. 17), the National Employment Lawyers Association belittled any potential argument by the respondent regarding the "specter

of 'runaway' and 'excessive' jury awards" resulting from the adoption of petitioner's standard for assessing punitive damages. According to that organization, Congress rejected this argument in 1991, when it amended Title VII and the ADA to provide for punitive damages. "Congress' decision to allow Title VII and ADA plaintiffs access to a jury of their peers evidences a policy choice that juries, rather than judges, should render moral judgment on a particular employer's conduct." (*Id.*)

The Association's argument misconstrues the issue before the Court. There is no dispute that punitive damages can be awarded under Title VII and the ADA, and that juries, rather than judges, decide on their propriety and amount (albeit, it is expected, without passing "moral judgment" on any party). The question to be decided presently by this Court is how §1981a(b)(1) should be interpreted, and in particular, what amount of evidence must a plaintiff put forward before the jury will be allowed to consider the issue of punitive damages. Failing to require a heightened standard of proof for punitive damages, as adopted by the court below, and the other appellate courts discussed above, will have several practical, negative consequences. Such consequences cannot have been intended by Congress in enacting the 1991 Civil Rights Act, and can best be avoided by adopting the respondent's analysis of §1981a(b)(1).

First, a ruling adopting the petitioner's position will provide employees and their attorneys with strong incentives to bring suit under Title VII and/or the ADA, regardless of the merits of the underlying case:

> By simply having to prove intentional discrimination to sustain an award of punitive damages, plaintiffs have a strong incentive to sue. Thus, many cases that may not normally merit punitive awards will be brought to provide a potential windfall and 'cashing in' for plaintiffs.

Note, *Court Disregards Legislative History of the Civil Rights Act of 1991 and Bucks Current Trends Regarding Punitive Damages: Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1996) (*"Note"* or *"Kolstad Note"*), 23 *Dayton L. Rev.* 643, 656-657 (Spring, 1998). It is not unreasonable or farfetched to conclude that providing such incentives to employees and their attorneys will only congest the federal court docket even further.

Second, a ruling in favor of the petitioner, and failure to adopt a heightened standard for allowing punitive damages to be considered, will create incentives for plaintiffs and their attorneys to choose federal over state courts for their discrimination claims. As stated in the *Kolstad Note*, a "loose standard" for punitive damages "will lead to forum shopping by Title VII plaintiffs. Plaintiffs will look to sue in a forum, which will provide the highest potential for monetary gain." *Note*, 23 *Dayton L. Rev.* at 657. If petitioner's standard is adopted, equating a finding of liability with the quantum of evidence required to consider a punitive damage award, the forum with the potential for such gain is very likely to be the federal court. Even in states without caps on punitive damages, plaintiffs and their attorneys, at least in some cases, will be inclined to choose the federal over the state forum, if they harbor any reservations about their ability to support a claim for punitive damages by adducing evidence beyond the evidence required for a finding of intentional discrimination.

Yet another negative effect likely to result from the adoption of petitioner's position is that businesses will be unnecessarily burdened. These burdens are likely to be significant, and to take many forms.

First, there is likely to be an increase in the number of discrimination charges and suits which employers face. In the wake of the enactment of the 1991 Civil Rights Act, there has already been a surge in the number of employment-related civil rights suits. *See* Barrier, *"Lawsuits Gone Wild," Nation's Business* (U.S. Chamber of Commerce, February 1998). The

adoption of a novel and unsupportable standard for submitting punitive damage issues to juries will only exacerbate this trend, increasing legal and other expenses for American business.

Moreover, all American businesses, including but not limited to retail employers, will face increased costs as a result of a decision such as that sought by petitioner. Most obviously, judgments adverse to employers are likely to be larger. In addition, the costs of settlement will increase. Most cases, of course, settle, without a state or federal trial ever being held. If attorneys for plaintiffs are provided with the weapon which they are seeking to extract from this litigation, plaintiffs will be able to exert even greater leverage in negotiating with employers. The most likely outcome is that employers will capitulate to plaintiffs' demands at higher and higher prices, lest they be saddled with a punitive damages award which, in petitioner's universe, will come fast on the heels of a finding of intentional discrimination.

Such results serve no one's interests. The NRF's members are proud of their efforts, including training and other preventive programs, both to comply with all anti-discrimination laws, including Title VII and the ADA, and to prevent charges from even being filed in the first place. These efforts will be undermined and subverted if litigants and their attorneys are provided aid and comfort by an opinion creating the constant threats of higher punitive damages and settlement costs.

The adoption of petitioner's position is likely to produce additional adverse consequences. For one, the line between compensatory and punitive damages will be obliterated. Under 42 U.S.C. §1981a(a)(1) and (b), the consideration of compensatory damages is not subject to the "malice or . . . reckless indifference" standard set forth in §1981a(b)(1); rather, all that is required for such damages to be considered is that there be a finding of intentional discrimination. *See* 42 U.S.C. §1981a(a)(1), (b). Interpreting §1981a in the manner urged by the petitioner, i.e., lowering the standard

for punitive damages such that the evidence required is the same for a finding of intentional discrimination, will mean that compensatory and punitive damages will be awarded under the same standards. Such a result is plainly contrary to Congress's intent, as evidenced by the language of 42 U.S.C.§1981a.

The elimination of this distinction will only exacerbate the already present danger that juries will use punitive damages as a proxy for compensatory damages. In the NRF's experience, juries are inclined to assess punitive damages to compensate for their inability to award compensatory damages, when no evidence of underlying emotional harm has been presented. By changing the rules by which §1981a has been interpreted, this trend can only worsen, and may be beyond the ability of trial and appellate courts to rectify. For example, if a plaintiff presents little or no evidence of emotional harm, a jury should not assess such damages, or, alternatively, any award can be readily attacked either after trial or on appeal, based on the absence of the necessary proofs. However, if a lowered standard for punitive damages is applied, a jury's decision to award such damages, as compensation for its inability to award emotional distress damages, could not readily be challenged, since the elimination of any kind of heightened standard of proof for punitive damages, may make it impossible for a district or appellate court to sort out the propriety of such an award.

A final negative consequence of adopting petitioner's position is that, in the words of the *Kolstad* note, it "is at odds with current public policy." *Note*, 23 *Dayton L. Rev.* at 657. The appendix to the dissenting opinion of Justice Ginsburg in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 614-619 (1996), compiled numerous measures either enacted or proposed by state legislatures "to curtail awards of punitive damages." Expanding the circumstances under which punitive damages can be recovered in federal court runs counter to this strong trend in the states. Such a result, moreover, is at odds with the intent of Congress in capping punitive

damages, and subjecting them to a heightened standard of proof which is over and above the proof required for a finding of intentional discrimination.

IV. CONCLUSION

For the reasons stated in this brief, *amicus curiae* National Retail Federation respectfully requests that this Court affirm the opinion of the lower court.

Respectfully submitted,

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January 20, 1999